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81 -2304

No.

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES STEEL CORPORATION,
Petitioner,

v.

KATHRYN J. GAUDIANO
(Widow of Arthur Gaudiano),
Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U. S. Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Section 411(c)(5) of the Black Lung Benefits Act, 30 U.S.C. § 921(c)(5), violates the Petitioner's Constitutional Rights under the Due Process Clause of the United States Constitution.

II. Whether the Court of Appeals erroneously affirmed the Benefits Review Board's decision that the Petitioner had failed to rebut the presumption of Section 411(c)(5) of the Black Lung Benefits Act, 30 U.S.C. § 921(c)(5).

PARTIES BELOW

All the parties[1] are named in the caption of the case. The parties were in the same relative positions as Petitioner and Respondent in the Court below.

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1. The list of subsidiaries and affiliates of the United States Steel Corporation required by Rule 28.1 is attached as Appendix D.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	i
Table of Contents	ii
Table of Authorities	ii
Opinions and Judgments Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	3
Reason for Granting the Writ	5
Conclusion	8
Appendix A—Court of Appeals Judgment Order	1a
Appendix B—Benefits Review Board Decision and Order	2a
Appendix C—Administrative Law Judge Decision and Order	15a
Appendix D—List of Subsidiaries and Affiliates of United States Steel Corporation	20a
Certificate of Mailing	24a

TABLE OF AUTHORITIES

Cases

Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910)	6
Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1 (1976)	5

Constitution

U. S. Constitution, Amendment V	1

STATUTES

	PAGE
28 U.S.C. § 1254(1)	1
30 U.S.C. § 901	2, 7
30 U.S.C. § 921(c)(5)	i, 2-6
30 U.S.C. § 921(c)(3)	3
30 U.S.C. § 934(a)(1)(A)(i)	6
30 U.S.C. § 934(a)(2)	6
30 U.S.C. § 945	6
Pub.L. No. 95-239	5

OPINIONS AND JUDGMENT BELOW

The Judgment Order of the Court of Appeals denying the Petition for Review of the Benefits Review Board Decision and Order was entered on March 29, 1982. The Order of the Court of Appeals is attached as Appendix A. The Decision and Order of the Benefits Review Board, United States Department of Labor is reported at 3 BLR 1-643 (1981) and is attached as Appendix B. The unreported decision of the Administrative Law Judge is attached as Appendix C.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use without just compensation.

United States Code, Title 30:

Sec. 901. (a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconioisis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease or who were totally disabled by this disease at the time of their deaths to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to ensure that in the furture adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconioisis.

(b) This title may be cited as the "Black Lung Benefits Act".

Section 921(c):

(5) In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 [March 1, 1978] who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a) (2),

unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as is available with respect to the health of the miner at the time of his or her death.

STATEMENT OF THE CASE

On December 9, 1974, Arthur Gaudiano met an untimely death in the course of his employment with United States Steel Corporation as a result of a crushing injury to his head. His widow will receive workmen's compensation benefits for the period of her widowhood under the laws of the Commonwealth of Pennsylvania. She filed a claim petition for Federal Black Lung benefits alleging that her husband was totally disabled by coal workers' pneumoconiosis at the time of his death. More specifically, the allegation was that he had complicated pneumoconiosis and thus entitled to the irrebuttable presumption contained in Section 411(c) (3), 30 U.S.C. § 921(c) (3) of the Black Lung Benefits Act (hereinafter referred to as "the Act"). The Hearing Officer made an award of benefits in the widow's favor, which was appealed to the Benefits Review Board and the appeal sustained on the basis that the miner did not have complicated pneumoconiosis. The widow, therefore, was not entitled to the presumption of Section 411(c) (3), 30 U.S.C. § 921(c) (3). However, while the case was in litigation, the Black Lung Reform Act of 1977 (Pub. L. No. 95-239) was passed by Congress and became effective on March 1, 1978. The Black Lung Reform Act contained a new presumption at Section 411(c) (5), 30 U.S.C. § 921(c) (5), that entitles survivors of miners who worked 25 or

more years before June 30, 1971, and died before March 1, 1978, to benefits unless it can be proven that the miner was not partially or totally disabled from pneumoconiosis at the time of his death.

Subsequent to the passage of the Black Lung Reform Act, the Benefits Review Board remanded the case for further hearing since the miner had the requisite 25 years employment before June 30, 1971 and his death occurred before March 1, 1978. Following a hearing the Administrative Law Judge ruled in favor of the widow on the basis of the presumption contained at Section 411(c) (5), 30 U.S.C. § 921(c) (5).

The United States Steel Corporation appealed the Administrative Law Judge's Decision and Order (Appendix C) to the Benefits Review Board challenging the constitutionality of Section 411(c) (5), 30 U.S.C. § 921(c) (5) and the erroneous finding that the presumption had not been rebutted. The Benefits Review Board upheld the constitutionality of Section 411(c) (5), 30 U.S.C. § 921(c) (5) and ruled that the employer had not rebutted the presumption (Appendix B).

A Petition for Review was filed with the United States Court of Appeals for the Third Circuit by the United States Steel Corporation. That Court without oral argument and without opinion denied the Petition for Review (Appendix A). No Petition for Rehearing was filed with the Court of Appeals. From the Judgment Order of the Court of Appeals this Petition for a Writ of Certiorari has been filed.

REASON FOR GRANTING THE WRIT

The Court of Appeals For the Third Circuit has decided an important question of federal law which has not been, but should be settled by this Court.

This case is the first opportunity for this Court to review the fifth presumption, the "widow's presumption," of the Act, Section 411(c) (5), 30 U.S.C. § 921(c) (5). The Court has previously reviewed the other four presumptions in the case of *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1976). The "widow's presumption" presumption was added to the statute by the Black Lung Reform Act of 1977 (Pub.L. No. 95-239).

This presumption is different from the other four presumptions contained in the Act. The other presumptions all require some medical evidence to reach either a presumption of disability or causal relationship between employment and disease.[2] The presumption now under review at subsection (c)(5) establishes total or partial disability due to pneumoconiosis without any medical evidence. All that is required for eligibility is a combination of years of coal mine employment before a date certain (June 30, 1971) and death before another date certain (March 1, 1978). It is submitted by the United States Steel Corporation that Congress did not have a sufficient basis to establish a presumption of disability based on years of coal mine employment and date

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2. The other presumptions contained in Section 411(c), 30 U.S.C. § 921(c) are as follows:

(1) a coal miner with a medical diagnosis of coal workers' pneumoconiosis and who has ten or more years of underground coal mine employment is rebuttably presumed to have contracted the pneumoconiosis in his employment.

of death, that there is no rational basis for it and therefore it is unconstitutional. *Usery v. Turner-Elkhorn Mining Co., supra; Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35 (1910).

After the passage of the Black Lung Reform Act of 1977, the Departmernts of Health and Human Services and Labor began a review of all previously denied claims pursuant to Section 435, 30 U.S.C. § 945. Included in that review were hundreds of claims that met the criteria set forth in the presumption of Section 411(c) (5), 30 U.S.C. § 921(C) (5). Once a claim met the basic criteria of the presumption the claimant began to receive interim benefits pursuant to Section 424(a) (1) (A) (i) and (2), 30 U.S.C. § 934 (a) (1) (A) (i) and (2) from the Black Lung Disability Trust Fund. Thus hundreds of thousands of

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(2) a coal miner who died of a respirable disease and who had ten or more years employment in an underground coal mine was rebuttably presumed to have died due to coal workers' pneumoconiosis.

(3) a coal miner with a chronic dust disease of the lung which diagnosed by chest roentgenogram with one or more large opacities and classified in category A, B or C of the ILO/UICC classifications, when diagnosed by biopsy or autopsy yields massive lesions in the lung, or when diagnosed by other means would yield the same results (complicated pneumoconiosis) created an irrebuttable presumption that the miner was totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis.

(4) a coal miner who (a) was employed for 15 or more years in an underground coal mine, (b) who had a chest roentgenogram negative for complicated pneumoconiosis (it could show simple pneumoconiosis), and (c) other evidence demonstrated the existence of totally disabling respiratory or pulmonary impairment was rebuttably presumed to be totally disabled by pneumoconiosis or that his death was due to pneumoconiosis.

dollars and probably millions of dollars were paid to survivors of miners without a scintilla of medical evidence, only based on years of coal mine employment before a date set by Congress and death before another date established by Congressional action — the date of enactment of the Black Lung Benefits Reform Act of 1977. If a coal mine operator was involved as a result of the miner being employed after January 1, 1970 the case could be controverted and referred to formal hearing before an Administrative Law Judge. Thus some of the initial determinations of eligibility have been reversed by an Administrative Law Judge's determination that the presumption has been rebutted by the coal mine operator. However, the test of rebuttability which allowed benefits to be paid even if the miner was only partially disabled[3] by pneumoconioisis is so difficult to overcome that most determinations have remained intact.

Thus Congress without requiring any medical proof has established a program to give benefits to certain survivors of coal miners under the guise of disability from coal workers' pneumoconiosis. This Court should not permit Congress to force coal mine operators to pay benefits under such a fictional scheme. To do so would be a signal to Congress to pass similar legislation requiring the payment of benefits to persons without regard to the existence of disability.

This important question should be resolved by the Court.

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3. This so even though the purpose of the Act is to provide benefits for miners and certain survivors of miners who are *totally* disabled from pneumoconiosis. Section 401(a), 30 U.S.C. § 901(a).

CONCLUSION

For the reason set forth above it is respectfully submitted that this Petition for Certiorari should be granted.

UNITED STATES STEEL CORPORATION

By .....

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412/433-2960

Dated: June 15, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 81-2229

UNITED STATES STEEL CORPORATION
Petitioner

vs.

KATHRYN J. GAUDIANO,
(Widow of Arthur Gaudiano)
Respondent

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
U.S. Department of Labor
Respondent

Petition for Review
Benefits Review Board
Benefits Review Board No. 79-435 BLA

Submitted Under Third Circuit Rule 12(6)
March 4, 1982

Before: HUNTER, WEIS AND HIGGINBOTHAM,
Circuit Judges

Judgment Order

After consideration of all contentions of the petitioner and of the Benefits Review Board, it is

ADJUDGED AND ORDERED that the petition for review of the Benefits Review Board order be and is hereby denied.

Costs taxed against petitioner.

By the Court,
JAMES HUNTER, III, *Circuit Judge*

Attest:
SALLY MRVOS, *Clerk*

Date March 29, 1982

APPENDIX B

Benefits Review Board
U.S. DEPARTMENT OF LABOR

No. 79-435 BLA
OWCP No. 191-07-4044

KATHRYN J. GAUDIANO
(Widow of ARTHUR GAUDIANO)
Claimant-Respondent
v.
UNITED STATES STEEL CORPORATION
Employer-Petitioner
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

Filed As Part of the Record
June 12, 1981
(date)
Agnes Kurtz
(Clerk)
Benefits Review Board

Decision and Order

Appeal from the Decision and Order of Eli Nash, Jr., Administrative Law Judge, United States Department of Labor.

James D. Strader, Pittsburgh, Pennsylvania, for the employer.

Carol A. Waller and John S. Lopatto III (Carin Ann Clauss, Solicitor of Labor; Laurie M. Streeter, Associate Solicitor; Judith E. Wolf, Co-Counsel for Black Lung Benefits), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, *Chief Administrative Appeals Judge*, MILLER* *and* KALARIS, *Administrative Appeals Judges*

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*Separate concurrence by MILLER, Administrative Appeals Judge, to follow.

KALARIS, *Administrative Appeals Judge:*

This is an appeal by the United States Steel Corporation (hereinafter, the employer) from a Decision and Order (77-BLA-129) of Administrative Law Judge Eli Nash, Jr., granting benefits to Kathryn Gaudiano[1] on a claim filed pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.*, (hereinafter, the Act).

This case concerns the presumption provided by Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5). Section 411(c)(5), created by Section 3(a)(3) of the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95 (March 1, 1978), provides a presumption of entitlement to benefits to the survivors of miners who were employed in the coal mines for 25 years or more before June 30, 1971, and who died prior to March 1, 1978.[2]

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1. We note that, in his Decision and Order, the administrative law judge misspelled claimant's name as "Guadiano." The correct spelling is "Gaudiano" as indicated on the miner's death certificate and marriage certificate.

2. In the case of a miner who dies on or before the date of enactment of the Black Lung Benefits Reform Act of 1977 who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a) (2), unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as is available with respect to the health of the miner at the time of his or her death. 30 U.S.C. §921(c) (5).

The administrative law judge invoked the presumption in the instant case on the basis of approximately 27 years of coal mine employment performed by Arthur Gaudiano (hereinafter, the miner) prior to June 30, 1971, and the miner's death on December 9, 1974.[3] The administrative law judge found the miner to have been at least partially disabled due to pneumoconiosis at the time of his death in a mine accident, and on that basis concluded that employer had failed to rebut the Section 411(c)(5) presumption. Employer was, therefore, ordered to pay survivor's benefits to claimant commencing December 1, 1974.

Employer has appealed raising two alternative arguments. First, employer argues that the presumption contained in Section 411(c)(5) of the Act is an unconstitutional denial of due process and equal protection. Second, assuming the constitutionality of Section 411(c)(5),

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3. This is the second time the instant case has been before the Board. The widow filed her claim on March 14, 1975, and was awarded survivor's benefits by then Hearing Officer Nash on April 12, 1977. Employer appealed and the Board reversed the hearing officer's finding of total disability due to pneumoconiosis which had been made pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921 (c)(3). However, the Board noted that claimant might be entitled to the benefit of the Section 411(c)(5) presumption and remanded the case to the Office of Administrative Law Judges for further consideration. *Gaudiano v. United States Steel Corp.*, 9 BRBS 282, BRB No. 77-528 BLA (1978). A new hearing was held on February 14, 1979, in order to enable the parties to introduce additional evidence and make arguments with respect to claimant's Section 411(c)(5) entitlement. Subsequently, Mr. Feirtag [sic] an administrative law judge, issued a Decision and Order on April 18, 1979, which he amended on June 13, 1979. These are the decisions currently on appeal before the Board.

employer contends that the administrative law judge erred in finding that the presumption had not been rebutted.

In response, the Director argues that the Benefits Review Board lacks authority to consider the constitutionality of Section 411(c)(5). If, however, the Board determines that it does have such authority, it is the Director's position that Section 411(c)(5) is constitutional. Further, it is argued that the decision by the administrative law judge is supported by substantial evidence and should be affirmed.

We turn first to the constitutional issues raised in the instant case. It is simply necessary to note that we have held that the Board has authority to hear and determine questions of constitutionality which arise with respect to the various Acts and regulations under our jurisdiction. *McCluskey v. Zeigler Coal Co.*, 2 BLR 1-1248 (1981). Therefore, we reject the Director's argument that we lack such authority.

Employer argues that Section 411(c) (5) is unconstitutional because there was not sufficient evidence before Congress to establish a rational connection between the facts required to be proved and the fact presumed, the standard articulated in *Mobile, Jackson and Kansas City Railroad Co. v. Turnipseed*, 219 U.S. 35 (1910). We have thoroughly examined the legislative history of Section 411(c)(5) in *Trujillo v. Kaiser Steel Corp.*, __BLR__, BRB No. 78-398 BLA (June 11, 1981), and concluded therein that the presumption satisfies this constitutional requirement. We therefore reject employer's contention that Section 411(c)(5) is unconstitutional.

Employer's second argument is that the administrative law judge erroneously found that employer had

failed to rebut the presumption in the instant case. The Board's authority to review the findings of the administrative law judge is limited. If the findings of the administrative law judge are supported by substantial evidence, are not irrational, and his decision is in accordance with applicable law, the decision may not be disturbed. 33 U.S.C. §921(b) (3) as incorporated by 30 U.S.C. §932; *O'Keeffe v. Smith Associates*, 380 U.S. 359 (1965); *Wells v. Peabody Coal Co.*, 4 BRBS 506, BRB No. 75-219 BLA (1976), *aff'd sub nom. Peabody Coal Co., v. Benefits Review Board*, 560 F.2d 797 (7th Cir. 1977). "Substantial evidence" has been defined as more than a mere scintilla. It is that quantity of evidence which "a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

Section 411(c)(5) provides that a miner's survivor is entitled to benefits unless it is established that at the time of death the miner was not "partially or totally disabled due to pneumoconiosis." 30 U.S.C. §921 (c)(5). We have held that this provision of the Act affords three distinct methods of rebuttal. The presumption is rebutted if it is established: (1) that the miner did not suffer from pneumoconiosis; or (2) that the miner, at the time of his death, was not partially or totally disabled; or (3) that the partial or total disability which the miner may have suffered at the time of his death was not due to pneumoconiosis. *Trujillo, supra.* We have also held that Section 727.204(c) of the regulations, which implements the Section 411(c)(5) presumption, must be read as providing the same three methods of rebuttal in order to be consistent with the Act. 20 C.F.R. §727.204(c); *Freeman v. Old Ben Coal Co.*, __BLR__, BRB No. 79-114 BLA

(June 11, 1981). Further, the standard for rebuttal under the second method, *i.e.*, proving no partial or total disability, is a showing that the miner did not suffer a reduced ability to perform his or her customary and usual work, or comparable and gainful work, at time of death. *Freeman, supra.*

On appeal the employer does not contest the administrative law judge's finding that the miner was afflicted with pneumoconiosis,[4] thus eliminating the first available method of rebuttal. Employer has also failed to introduce any evidence with respect to the third method of rebuttal, *i.e.*, that any partial or total disability suffered by the miner at the time of his death was not due to pneumoconiosis.

Employer maintains that it presented a considerable amount of evidence below to establish that the miner was not partially or totally disabled at the time of his death (the second rebuttal method), but that the administrative

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4. We conclude that the evidence of record supports the administrative law judge's finding that the deceased suffered from simple pneumoconiosis at time of death. The miner's autopsy produced the following pathologic diagnoses: crush injury of the head and thorax; avulsion of the heart; massive intrathoracic hemorrhage; multiple fractures of the ribs, vertebrae and upper extremities; *coal miners' pneumoconiosis;* cor pulmonale; arteriosclerotic heart disease; pulmonary emphysema and fibrosis; laceration of the spleen, liver and lung; arteriolar nephrosclerosis. The death certificate lists the cause of death as crush injury of the head and thorax; avulsion of the heart; and massive intrathoracic hemorrhage. The death certificate also lists coal miners' pneumoconiosis as another significant condition. This evidence constitutes substantial evidence in the record considered as a whole to support the administrative law judge's finding.

law judge failed to take this evidence into account in reaching his decision.

The only evidence of record tending to rebut the presumption is the testimony of a foreman employed by the employer, who stated that the miner performed his job fully until the day of his death in a mining accident. The foreman testified further that he had never received any complaints from the miner regarding his ability to perform the jobs assigned to him and that the miner was described to him as an average employee.

We note that Section 727.204(d)(1) of the regulations provides that evidence "that a deceased miner was employed in a coal mine at the time of his death" alone shall not be sufficient to rebut the Section 411(c)(5) presumption. 20 C.F.R. §727.204(d)(1); *Freeman, supra.* Section 727.204(d)(1), however, is not a bar to rebuttal in the instant case because the foreman's testimony, summarized *supra*, goes beyond the mere fact of employment at the time of the miner's death. The testimony, if uncontradicted and if found to be credible by the administrative law judge, could establish that the miner had no reduced ability to work at the time of his death and thus could rebut the Section 411(c)(5) presumption.

However, there was also testimony from the same foreman which established that the miner did have a reduced ability to perform his usual and customary work and was, therefore, partially disabled. The foreman testified that, if Mr. Gaudiano walked along distances, he would walk more slowly than most people and that his breathing sounded different than the breathing of other people. The foreman felt that the miner had breathing difficulty. At the original hearing held on February 24, 1977, the claimant testified that her husband had difficulty breathing on exertion, especially during the seven

months before his death. Claimant testified that she had observed her husband having difficulty sleeping because of his breathing; that he coughed a great deal of phlegm; that he had to stop when climbing stairs; and that he became short of breath if he carried something. Hearing Transcript of February 24, 1977, at 15-16.

After careful review, we conclude that there is substantial evidence on the basis of the testimony presented to support the administrative law judge's finding that the decedent was at least partially disabled at the time of his death. The administrative law judge considered the testimony of the foreman and decided to credit that protion of it which supported a finding of partial disability, i.e., that the miner was having physical difficulties at work when required to walk long distances. The trier of fact is given broad authority to weigh the evidence before him and the Board may not reweigh the evidence even if it would have reached a different conclusion. We, therefore, hold that employer failed to carry its burden of rebutting the Section 411(c)(5) presumption and we affirm the award of benefits before us on appeal.

Finally we note that the Board, on its own motion, consolidated this case and ten others for the purpose of additional briefing on the issue of the proper party to bear liability in a case in which an award is made pursuant to Section 411(c)(5). *Trujillo v. Kaiser Steel Corp. et al.*, BRB No. 78-398 BLA, Board Order of March 28, 1980. Arguments were raised by some operators that the Black Lung Disability Trust Fund should be liable in cases involving Section 411(c)(5) awards, when the miner completed 25 years of coal mine employment prior to January 1, 1970, despite continued employment thereafter. Employer in the instant case, however, argues that the Trust Fund is not liable but rather concedes that, if

claimant is entitled to benefits, it (employer) is the proper party to bear such liability. The Director also argues that an operator, rather than the Trust Fund, is liable for Section 411(c)(5) benefits, as long as the miner worked for an operator for at least one year and had at least one day of employment with the operator after 1969. 30 U.S.C. §932(c); 20 C.F.R. §§725.492-725.493. Thus there is no disagreement between the parties in the instant case on this issue. In addition, their position is consistent with our holding in *Trujillo, supra*, in which we held that nothing in the Act establishes that the Trust Fund, rather than operators, is liable for the payment of benefits awarded to survivors under Section 411(c)(5), except in those circumstances applicable generally to non-Section 411(c)(5) cases.

Accordingly, the Decision and Order appealed from is affirmed.

ISMENE M. KALARIS
Administrative Appeals Judge

SAMUEL J. SMITH, Chief Administrative Appeals Judge, concurring:

While I concur in the result reached by my colleagues in the instant case, I do not necessarily agree with all of their legal reasoning and rationale.

SAMUEL J. SMITH, Chief
Administrative Appeals Judge

Dated this 12th day
of June 1981

SERVICE SHEET

BRB No. 79-435 BLA: Kathryn J. Gaudiano (Widow of Arthur Gaudiano) v. U.S. Steel Corporation and Director, Office of Workers' Compensation Programs (Case No. 77-BLA-129) (OWCP No. 191-07-4044)

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Benefits Review Board
U. S. Department of Labor

No. 79-435 BLA
OWCP No. 191-07-4044

KATHRYN J. GAUDIANO
(Widow of ARTHUR GAUDIANO)
Claimant-Respondent
v.
UNITED STATES STEEL CORPORATION
Employer-Petitioner
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

Filed As Part of the Record
July 22, 1981
(date)
Agnes Kurtz
(Clerk)
Benefits Review Board

CONCURRING OPINION

MILLER, Administrative Appeals Judge, concurring:

I concur in the decision to affirm the award of benefits of the administrative law judge.

However, I would hold that the testimony of employer's foreman does constitute nothing more than evidence "that a deceased miner was employed in a coal mine at the time of his death" and hence is legally insufficient to defeat entitlement pursuant to Section 411(c)(5). 20 C.F.R. §727.204(d)(1). In this regard, I note that this testimony would not militate against a finding of total disability. *See, e.g., Collins v Mathews*, 547 F.2d 795 (4th Cir. 1976).

JULIUS MILLER
Administrative Appeals Judge

Dated this 22nd
day of July 1981

SERVICE SHEET

BRB No. 79-435 BLA: Kathryn J. Gaudiano (Widow of Arthur Gaudiano) v U.S. Steel Corporation and Director, Office of Workers' Compensation Programs (Case No. 77-BLA-129) (OWCP No. 191-07-4044)

Copies were sent to the following:

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APPENDIX C

U.S. Department of Labor
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
Date Issued April 18, 1979

In the Matter of KATHRYN J. GAUDIANO Widow of ARTHUR GAUDIANO Claimant-Respondent v. UNITED STATES STEEL CORPORATION Employer-Petitioner and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS Party-in-Interest	Case No. 77-BLA-129 OWCP No. 191-07-4044 BRB No. 77-528-BLA

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For the Claimant-Respondent

JAMES D. STRADER, Esq.
For the Employer-Petitioner

BERTHA E. HERNANDEZ and CAROL A. WALLER, Esqs.
For the Director

Before: ELI NASH, JR., Administrative Law Judge

Decision and Order-Award of Benefits

This proceeding arose upon a claim filed under the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. Section 901 *et seq.* The Benefits Review Board found on May 31, 1978, that substantial evidence in the record considered as a whole did not support the undersigned findings of

complicated pneumoconiosis. The Board noted that 20 C.F.R. Section 410.418 provides a diagnosis of complicated pneumoconiosis results only when chest x-rays yield one or more large opacities greater than 1 centimeter in diameter or when autopsy yields massive lesions in the lung or if the histological findings on autopsy show simple pneumoconiosis and progressive massive fibrosis. However, the Board found that on the basis of the entire record the decedent may be entitled to Black Lung benefits on the basis of Section 411(c)(5) of the Act, 30 U.S.C. Section 921(c)(5). In this regard, the Board noted that the Black Lung Benefits Reform Act of 1977 amended Section 411(c) of the Act, by adding the following:

> In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, ... unless it is established at the time of his or her death such miner was not *partially* or totally disabled due to pneumoconiosis. [Emphasis supplied]

The Board remanded the case to the Office of Administrative Law Judges for specific findings of fact and conclusions of law consistent with the above section.

On October 2, 1978, the parties were ordered to indicate their views as to whether the case should be remanded to a Deputy Commissioner for benefits, or if the case was not remanded, what, if any, additional evidence on the nature of the decedent's coal mine work should be included in the record, whether it could be accomplished through written submission or a reopened hearing; and, or, if, there is any other course of action on remand.

All parties responded to the order. Both claimant and the Director were of the opinion that the present record was sufficient to find that the Section 411(c) (5) presumption has been invoked and that the presumption had not been rebutted. They urged, on the basis of the present record, the decedent's widow would be entitled to benefits. However, the Director recognized that due process would require that the record be reopened, since the Section 411(c) (5) presumption established a new basis for eligibility which did not exist at the time of the initial hearing in this case. The employer contends that since decedent had been killed in a coal mine accident and was regularly and actively employed at the time of his demise he was most certainly not totally disabled and that since the Benefits Review Board had decided that he did not have complicated pneumoconiosis the widow should not be allowed the benefit of the irrebuttable presumption of Section 411(c) (3).

The hearing was reconveyed in Pittsburgh, Pennsylvania, on February 14, 1979. All parties were present and had full opportunity to present evidence or witnesses, arguments and cross-examination.

Findings of Fact and Conclusions of Law

The claimant has established her entitlement to benefits on the basis of the presumption contained in §411(c) (5) of the Act. Insofar as relevant to this case, the claimant established that her husband was engaged in coal mine employment for at least 25 years prior to his death and that at the time of his death her husband was suffering from pneumoconiosis. While there is no evidence in the case that he was afflicted with complicated pneumoconiosis it is undisputed, at this point, that the decedent was afflicted with pneumoconiosis. This has been estab-

lished both by autopsy and by testimony of the claimant's widow as to her husband's condition of health. This testimony, together with evidence of 25 years of coal mine employment, is sufficient foundation for the irrebuttable presumption.

The employer's witness, foreman Magill testified that he had observed the decedent having some physical difficulties at work particularly when required to walk long distances. Mr. Magill also testified that the decedent's breathing sounded different from some other people and that he felt claimant had some breathing difficulties.

In spite of the testimony and evidence presented by the employer the presumption in this matter stands unrebutted. Nonetheless, the employer contends that the decedent was not totally disabled and was not totally or partially disabled at the time of death due to a mine accident and that there was no physical limitation to his work at the time of his death. The aim of the employer's argument is, of course, to rebut the presumption under Section 411(c) (5). I feel constrained to conclude that this attempt has failed.

By reason of the foregoing it is found that the decedent was at least partially disabled due to pneumoconiosis at the time of his death in a mine accident and consequently his surviving spouse is entitled to payment of benefits. I find further that United States Steel is liable for the payment of benefits to the decedent's surviving spouse, and to reimburse the Secretary of Labor for any benefits paid to the claimant for any period after December 9, 1974.

Order

United States Steel Company is hereby ordered to:

(1) Pay to decedent's surviving spouse all benefits to which she is entitled under the Act, commencing as of December 9, 1974.

(2) Reimburse the Secretary of Labor for any payment under the Act he has made to the claimant for any period after December 1974, and to deduct such amount, as appropriate, from the amount it is ordered to pay under paragraph 1.

(3) Pay to the claimant or the Secretary of Labor, as appropriate, interest at the rate of 6 per centum per annum, computed from the date any payment was due to the date such payment is actual made.

ELI NASH, JR.
Administrative Law Judge

EN:Zee

APPENDIX D

List of Subsidiaries and Affiliates of the United States Steel Corporation

The United States Steel Corporation has no parent company. The companies listed at Item I are affiliates or subsidiaries in which the United States Steel Corporation owns less than 100%. The companies listed at Item II are affiliates or subsidiaries in which the Marathon Oil Company, a wholly owned subsidiary of USS Holdings, Inc., a wholly owned subsidiary of the United States Steel Corporation, owns less than 100%:

I. Name of Company	*State or Sovereign Power of Incorporation*
Adela Investment Company, S.A.	Luxembourg
Africa Mining & Trust Company, Ltd.	South Africa
Altos Hornos de Vizcaya, S.A. (AHV)	Spain
Ashco, Inc.	Ohio
Associated Manganese Mines of South Africa, Ltd.	South Africa
Associated Ore & Metal Corporation, Ltd.	South Africa
Athlone Prospecting & Development Corporation, Ltd.	Irish Republic
Avsteel SWA, Ltd.	South Africa
Bartow Chemical Products	Florida
Baumare, Inc.	Liberia
Blue Grass Phosphate Company	Maine
Brazaco-Mapri Industrias Metalurgicas, S.A.	Brazil
Century III Associates	Pennsylvania
Comireg S.A.	France
Compagnie Miniere de l'Ogooue (Comilog) Companies owned by Comilog	Gabon
Companhia Siderurgica Paulista, "Cosipa"	Brazil
Deepsea Ventures, Inc.	Delaware
FHS Automotive Parts Manufacturing Ltd.	Wales, G.B.
FHS Stahlverformung GmbH	West Germany
Feralloys, Ltd.	South Africa
First National Bank (Albion, Pa.)	Pennsylvania
Gardinier Joint Venture (Non-operating)	Florida
Industria de Tubos y Perfiles, S.A. (Intupersa)	Guatemala
Inspection Technology, Inc.	Delaware
Inyala Chrome Company (Private) Limited	Rhodesia
Kappa Mining & Prospecting Co., Ltd.	South Africa

1. Name of Company	*State or Sovereign Power of Incorporation*
LaPointe Iron Company	Wisconsin
Lions Ridge at Vail	Colorado
Live Oak Uranium Operations	Texas
Mahoning Ore & Steel (Partnership)-(Formerly Mahoning Ore and Steel Company which was dissolved 1/1/79	Minnesota
Mecania Walsywa, Ltda.	Brazil
Merinda Mineracao	Brazil
Mineracao Carajas, Ltda.	Brazil
Mineracao Maraba, Ltda.	Brazil
Mineracao Xingu, Ltda.	Brazil
Minerales Oriaz C.A.	Venezuela
Nati Gas Co.	Ohio
Naviteck Company	Liberia
Northern Tier Pipeline Co.	Delaware
Ocean Mining Associates	Virginia
Orsteel Investments (Proprietary), Ltd.	South Africa
P.T. Pacific Nikkei Indonesia	Indonesia
Pennzoil do Brazil, Ltd.	Texas
Penokee Iron Co.	Wisconsin
Prieska Copper Mines (Pty.) Ltd.	South Africa
RMI Company	Ohio
Rinker Materials Corporation	Florida
Rockland Joint Venture (Cost-sharing)	Florida
SIDBEC-Normines, Inc.	Quebec, Canada
Sacinter	Switzerland
Sigma Mining & Prospecting Co. (Pty.), Ltd.	South Africa
Sofemi S.A.	France
Structural Dynamics Research Corporation	Ohio
Termerid Mineracao, SA	Brazil
Terminoss Acciai Inossidabili-S.p.A.	Italy
Theta Mining & Prospecting Company (Pty.) Ltd.	Botswana
Tilden Iron Mining Company	West Virginia
Tinapco	Missouri
Torremco-Sociedada de Navegacao E Comercio, Ltda.	Brazil
Tradco	Ohio
Triangeler Daemmaloffwerk GmbH (Triangel GmbH	West Germany
USS MaxTech Company (Japan), Ltd.	Japan
USS MaxTech Company, Inc.	Delaware
USS MaxTech Company, Ltd.	Liberia
USS Technology (Japan), Ltd.	Japan

I. Name of Company	*State or Sovereign Power of Incorporation*
Wadsworth Parkway Associates, Ltd. (owned by Eighty-Eighth & Wadsworth Corporation	Colorado
West Africa Bulk Shipping	Liberia
West Union Canal Company, The	Utah
Zeerust Chrome Mines, Limited	South Africa
Zeta Mining & Prospecting Company (Pty.), Ltd.	Botswana
Zurai Agro Chemicals Ltd.	India
Zululand Titanium (Pty.), Ltd.	South Africa

II. Name of Company	*State or Sovereign Power of Incorporation*
Artic LNG Transportation Company	Liberia
Automotive Fuel Corporation of Delaware, Inc.	Delaware
Automotive Fuel Corporation	Illinois
Badger Pipe Line Company	Delaware
CLAM Pet. Company	Delaware
Cheker Oil Company of Delaware, Inc.	Delaware
Cheker Oil Company of Florida, Inc.	Florida
Cheker Oil Company of Indiana, Inc.	Indiana
Cheker Oil Company of Michigan, Inc.	Michigan
Cheker Oil Company of Ohio, Inc.	Ohio
Cheker Oil Company of Wisconsin, Inc.	Wisconsin
Cheker Oil Company	Illinois
Cheker-Imperial Oil Co. of Alabama	Alabama
Cheker-Imperial Oil Co. of Arkansas	Arkansas
Cheker-Imperial Oil Co. of Georgia	Georgia
Cheker-Imperial Oil Co. of Iowa	Iowa
Cheker-Imperial Oil Co. of Kansas	Kansas
Cheker-Imperial Oil Co. of Mississippi	Mississippi
Cheker-Imperial Oil Co. of Missouri	Missouri
Cheker-Imperial Oil Co. of Nebraska	Nebraska
Cheker-Imperial Oil Co. of Tennessee	Tennessee
City Point Oil Terminal, Incorporated	Virginia
Compania Iberica Refinadora de Petroleos, S.A.	Spain
Cook Inlet Pipe Line Company	Delaware
Deutsche Transalpine Oilleitung GmbH	Germany
Dor Rae Realty, Ltd.	Illinois
Ecol Inc. (Mississippi)	Mississippi
Explorer Pipeline Company	Delaware
Globe Oil Company, U.S.A.	Georgia
Gravcap, Inc.	Delaware
Green Bay Terminal Corporation	Wisconsin
Kenai LNG Corporation	Delaware
Kroll Glass Service, Inc.	Illinois

II. Name of Company	*State or Sovereign Power of Incorporation*
Locap Inc.	Delaware
Loop Inc.	Delaware
Marco South, Inc.	Florida
Oasis Oil Company of Libya, Inc.	Delaware
Oil Insurance Limited	Bermuda
Oil Shippers Service, Inc.	Delaware
Oklahoma Oil Co.	Delaware
Pilot Oil Corporation	Tennessee
Platte Pipe Line Company	Delaware
Polar LNG Shipping Corporation	Liberia
Port Oil Inc.	South Carolina
Qualbank, Inc.	Delaware
Russell Stewart Oil Co.	Illinois
Sandcastle Sand Company, Inc.	Illinois
Societa Italiana per l'Oleodotto Transalpino, S.p.A.	Italy
The Airport Company of Hilton Head Island, Inc.	South Carolina
Transalpine Finance Holdings S.A.	Luxembourg
Transalpine Olleitung in Osterreich GmbH	Austria
U-Save, Inc.	Georgia
Valley Beach, Inc.	Florida
Webster Service Stations, Inc.	Delaware
West Shore Pipe Line Company	Delaware
Wolverine Pipe Line Company	Delaware

Certificate of Mailing

This is to certify that on this 15th day of June, 1982, three true and correct copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT and APPENDIX was served on the following by first class mail, postage prepaid, certified mail, return receipt requested:

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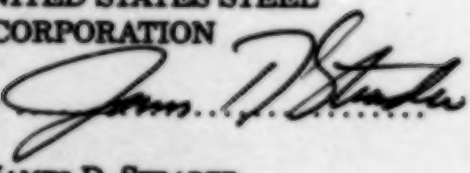
UNITED STATES STEEL
CORPORATION

By 

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